



Bad Business: A Review of the Supreme Court's Term

By Michael S. Greve

The Supreme Court's 2008–2009 term brought modest progress on civil rights; a personnel change that is unlikely to alter the Court's balance; and massive confusion and backpedaling on “business cases”—that is to say, the legal structure that governs the commerce of the United States. That structure is in grave disrepair. Alas, the justices show little awareness that the problem is of constitutional dimensions, and that it is theirs to fix. Among the self-inflicted debilities, the term suggests, is a needlessly constricted vision of judicial originalism.

No menace of socialism threatens the United States. Socialism implies a seriousness of purpose and a willingness and ability to impose order, none of which is in evidence. Our problem is just the opposite—institutional disintegration, or the proliferation and growing authority of semi-autonomous policy centers: state courts and juries; multistate agencies that cannot be found in any government organization chart, let alone the Constitution; independent, nominally private agencies that are authorized to tax and regulate corporations; uncounted tsars in the bramble of a mixed economy; state attorneys general and treasurers in cahoots with trial lawyers; and so on, ad nauseam et infinitum.

None of our *n* regulators is strong enough to enable citizens to go about their business within a tolerably predictable legal framework. All, however, are able and eager to frustrate productive activities and to confiscate their proceeds. If one entity fails to regulate, tax, or punish, another will. No agency functions as a veto point for any other. Each provides an opportunity point for parasitic factions, now called stakeholders.

Michael S. Greve (mgreve@aei.org) is the John G. Searle Scholar at AEI.

To its credit, the Roberts Court has cut back on those tendencies at times. Its interventions, however, are intermittent, offset by lurches in the opposite direction and uninformed by a coherent view of the constitutional universe. The term just ended illustrates the Court's problem, and ours.

The 2008–2009 Term

Over the 2008–2009 term, the Supreme Court confronted the disintegration problem in a wide range of settings and permutations. In five cases, the justices wrestled with state courts and juries' propensity to exploit interstate commerce fifty times over by means of punitive damages or bet-the-firm class actions. In three cases arising over and under the Federal Arbitration Act, the Court dealt with private parties' attempts to escape the vagaries of our so-called legal system by means of private, contractual arrangements. Three important federal preemption cases (about which much below) posed the common, increasingly urgent question of whether and when state regulators and courts may subject private firms to legal obligations at variance with, and in excess of, demanding federal standards. Four environmental cases arose under citizen suit provisions, which invite

advocacy organizations to block public projects or to insist on ecological purity on behalf of everyone and no one in particular. All of these cases implicate the power of factions to exploit productive enterprises from some institutional beachhead.¹

The Roberts Court reached pro-business, antidisintegration decisions in just under two-thirds of the term's cases (depending on what exactly one counts as a business case). The raw count misleads, however. First, "business wins" tend to be smaller than losses. For instance, all of this term's environmental cases can be characterized as business victories, but they bear no comparison—even in the aggregate—to the disastrous 2007 ruling in *Massachusetts v. EPA*, which transformed the Clean Air Act into a global warming statute. Second, with rare exceptions (such as antitrust law, where the Court has done an admirable job of creating sensible federal common law rules),² the Court's advances are too cabined and too erratic to establish reliable barriers against regulatory proliferation.

For one example, the justices have tended to curb lawyer-driven litigation and regulation by litigation by means of judicial standards, such as heightened pleading requirements.³ Tighter standards are all to the good. Unlike a rule, however (say, a categorical bar against a particular cause of action), they allow the lawyers to fight another day. Thus, despite multiple interventions by the Supreme Court (as well as Congress), securities class actions show few signs of abating.

For another example, many of the Court's decisions have been excruciatingly clause-bound. Again, attention to the statutory text is to the good, but federal preemption cases illustrate its excesses. Preemption is an on-off decision: when the Court says "no preemption," the number of regulators zooms Buzz Lightyear-style, from one (federal agency) to infinity and beyond. Yet the Court has held (unanimously) that an entire federal regulatory regime may lose its preemptive force over state tort suits if the statutory preemption clause contains the word "a" before the term "state law."⁴ Similarly, in *Riegel v. Medtronic* (2008), the Court determined that the Medical Device Act (MDA) preempts design defect lawsuits under state law. The *Riegel* majority waxed eloquently over the deleterious consequences of having

medical standards determined by lay juries with massive hindsight bias. In contrast, in this term's *Wyeth v. Levine*, the Court held that the federal Food, Drug, and Cosmetics Act (FDCA) does not preempt state liability lawsuits over "inadequately" labeled drugs. Unlike the MDA, the

FDCA contains no express preemption provision, whence the Court inferred that Congress intended the adequacy of federally approved labels to be determined by the same local juries that cannot be trusted with medical devices. Literalism, pursued to the point of chasing indefinite articles, drives out a substantive analysis of the regulatory scheme.

The main tributary to the stream of judicial unconsciousness is the predisposition of the Court's liberal bloc of four,

which celebrates regulatory proliferation and unchecked factionalism as "active liberty" and "federalism." That orientation, though, prevails far more often than it should, for a number of reasons. Justice Kennedy sometimes supplies a crucial fifth vote, notably in environmental cases. ("Probusiness" environmental decisions are written very narrowly to prevent his defection.)⁵ But a more common, less-expected source of the Court's lapses is an unyielding, doctrinaire originalism.

That tendency is best explained against the backdrop of a case in which it does *not* appear. The past term's little-noted decision in *Polar Tankers, Inc. v. City of Valdez* shows the justices at their considerable best. Not coincidentally, it involves a constitutional clause no one has heard of in a very long time.

Total Recall

Valdez, Alaska, imposed a personal property tax on large ships (almost exclusively tankers) for the duration of their stay in the city's port, in proportion to time spent in other states' ports. Is that tax consistent with the Constitution's Tonnage Clause (Article I, Section 10, Clause 3), providing that no state shall "without the Consent of the Congress, lay any Duty of Tonnage"? By a 7-2 vote (Justices Stevens and Souter dissenting), the Court got both the clause and the case right.

How do we determine whether a property tax falls under the prohibition against a "Duty of Tonnage"? Not, Justice Breyer's opinion for the Court explains, through

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literalism, but rather by “interpreting the language of the Clause *in light of its purpose*.”⁶ The Tonnage Clause and its constitutional Section 10 neighbors—in particular, the immediately preceding prohibition against state levies on imports or exports, without the consent of Congress—are plainly calculated to block states from exercising the taxing power “injuriously to the interests of each other.”⁷ To that end, the constitutional language must be read beyond its literal terms, as forbidding a state to “do that indirectly which she is forbidden . . . to do directly.”⁸ The coin of constitutional interpretation is a principle against circumvention: Valdez and Alaska cannot escape the constitutional prohibition by calling the prohibited duty by another name (“property tax”). And an analysis of the tax shows that it is not a service fee (for pilotage, for example), but rather an exaction for the privilege of entering a port, which the Tonnage Clause forbids.⁹

Attention to constitutional structure and purposes; an interpretive maxim against evasion; healthy skepticism of the states’ opportunistic strategies; and “the convenient apologetics of the police power,” in Justice Holmes’s splendid phrase:¹⁰ armed with these presumptions, the justices will get the constitutional structure right. Two facets of *Polar Tankers* aided the recovery of constitutional memory.

First, the city of Valdez did not implicate any eco-bauble, sacred jury rights, confounded consumers, or health or safety halo to adorn the naked revenue grab. That setting helps to hold liberal and centrist justices to the constitutional project of protecting the gains of collective national organization against local exploitation. Second, the Tonnage Clause was last heard of in 1935.¹¹ The step into a pre–New Deal constitutional universe prompts the justices to think like nineteenth-century jurists, with an eye on the purposes of the Constitution and the judiciary’s institutional obligation to make it work. Absent those factors, the constitutional intuitions that inform *Polar Tankers* give way to very different dispositions.

Commerce

The concerns over state exploitation so deftly addressed in *Polar Tankers* are of a general nature. What if a state

manages to maneuver taxes or equivalent regulations outside the ambit of the Tonnage Clause or the Import-Export Clause? Suppose Alaska taxes oil at the point of production, with the same effect as the purported property tax in *Polar Tankers*, or suppose Alaska levies a national sales tax: what then?

Historically, the concerns encapsulated in but not covered by the Tonnage Clause and the Import-Export Clause have been captured by two theories: the notion that the “dormant” Commerce Clause—of its own force and without congressional legislation—forbids discriminatory and exploitative state impositions on interstate commerce, and the notion that the Due Process Clause (as well as the Commerce Clause) prohibits “extraterritorial” state legislation. Thus, the dormant Commerce Clause forbids (among other things) state attempts to substitute regulatory tariff barriers for explicitly prohibited import taxes.¹² Similarly, the due process theory embodies the elementary federalism

notion that states should legislate for their own citizens but not, presumably, for others’.

The structural principles are compelling. But they are not easily hung on the particular clauses from which they are said to derive.¹³ That did not trouble the justices of the nineteenth century or the pre–New Deal era. It is, however, decisive for our Court’s originalists. Justice Scalia and Justice Thomas have vehemently denounced the dormant Commerce Clause as an “illegitimate” judicial invention—as *Lochner* in drag. (Chief Justice Roberts has shown sympathy with this position.)¹⁴ They have likewise intimated that due process claims, including claims that a state’s jurisdiction over wholly foreign parties cannot possibly be “due,” are *Roe* in disguise.

Given those positions, non–Tonnage Clause cases over state impositions that are structurally and economically identical to the *Polar Tankers* tax come out the other way. In fact, *Polar Tankers* itself presented Commerce Clause and due process claims alongside the Tonnage Clause—and, but for the Tonnage Clause, probably would have come out the other way.

Clause-bound originalism puts too much weight on the Constitution’s individual clauses, and too little on its structure. The Tonnage Clause and the Import-Export

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Clause protect things that float or move across a taxing state's borders, but it cannot be that beyond those conceptual limits states are effectively free to tax anything that moves anywhere. That, though, seems to be the originalist teaching, and its triumph may not be far off.

In *Quill v. North Dakota* (1992), the Supreme Court mowed down due process obstacles to extraterritorial taxation, while still managing to preserve Commerce Clause barriers to the imposition of tax obligations on entities with no physical nexus to the taxing jurisdiction (such as Internet sellers). This term, the justices took a pass on two certiorari petitions in cases over extraterritorial state business taxation (*VFJ Ventures, Inc. v. Surtees* and *Capital One v. Commissioner of Revenue*). Business constituencies have voiced disappointment over those punts, but they should count their blessings while they last.

Torts

States need not tax in order to exploit. They can achieve the same result by means of liability verdicts. Consider products liability: since manufacturers cannot keep their products out of a state or price them in accordance with the local liability risks, the strictest state sets the standard for all. Trial lawyers will predictably sort themselves into that jurisdiction.

Can it be that a Constitution that sets its face against state tax exploitation—which requires a state legislature's affirmative act—permits a local court's or jury's equivalent measure, at the instigation of roving trial lawyers? No way, said every Court until the New Deal. Way, said the New Deal Court. *Erie Railroad v. Tompkins* (1938) ordained that federal courts would henceforth follow the law of the plaintiff's chosen state venue, not the federal general common law that had governed these matters for the preceding 150 years. There is no federal general common law, *Erie* said. As the *Erie* regime matured, constitutional limitations on plaintiffs' opportunistic choices and on states' tendency to accommodate them—the Due Process Clause, the Full Faith and Credit Clause—went by the boards. This is the true source of the "litigation explosion."¹⁵

Its absurdities periodically impress themselves on the justices. For example, the Court has held repeatedly that

due process forbids state juries to punish corporate defendants on the basis of their conduct in other jurisdictions (where that conduct may have been legal). Juries, however, must remain at active liberty to tell corporate defendants that they are evil, and so jurors may take

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extraterritorial conduct into consideration in assessing blameworthiness. To make this fine distinction stick, the justices microanalyze state courts' jury instructions. When that proves futile, they throw in the towel and dismiss certiorari as improvidently granted, as they did this past term in *Philip Morris USA v. Williams*.¹⁶ Similarly, the justices ruled in *Norfolk & Western R. Co. v. Ayers* (2003) that liability for fear of asbestos-related illnesses under the Federal Employers' Liability Act (FELA) is to be determined not by federal common law (as FELA very probably demands), but under state law. Upon

learning what they should have known all along (specifically, that state courts and law are prone to horrid bias), this term the justices intervened per curiam and ad hoc and set aside a state jury verdict on the grounds of defective jury instructions (*CSX Transportation Inc. v. Hensley*). In short, the justices sense that something is not quite right with national regulation by state court litigation.

What they lack, and what they will not allow themselves to have in the post-*Erie* world, is a constitutionally grounded theory that would provide order. The Court's liberals and Justice Kennedy exercise a "fundamental fairness" gut check—an instinct prominently on display in this term's *Caperton v. A. T. Massey Coal Corp.*, which held that elected state judges must recuse themselves if a party to a case before them had a "significant and disproportionate influence" in the judge's election.¹⁷ That intervention, one can safely predict, will do little to drain the state tort litigation swamp. (Chief Justice Roberts's principal dissent helpfully lists forty of the more obvious questions to be raised in future *Caperton* motions.)

The conservative justices are hostile to a freewheeling, *Caperton*-style due process, and for entirely good reasons.

Far more difficult to sustain is the notion that a constitutionally unconstrained *Erie* regime is nothing to worry about, or more precisely, that it is something for Congress, and Congress alone, to worry about. That common suggestion means that federal preemption of state law is the only

tort reform that can be had. Congress, however, is very ill-suited to the task. Worse yet, the Court’s preemption doctrines have made the legislature’s difficult job harder still.

Life Is Good

Start with what ought to be an easy case: the Federal Cigarette Labeling and Advertising Act explicitly preempts any state “requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity” with the act and federal regulations.¹⁸ “Light” and “low-tar” cigarettes are so labeled. The question in this term’s *Altria Group v. Good* was whether manufacturers can nonetheless be held liable for “deceptive” practices if, and precisely because, they sell cigarettes with those labels. The theory is that the manufacturers knew that smokers often compensate for the products’ supposed less unhealthful attributes by smoking more or inhaling more deeply.

The *Good* majority—the liberal bloc, joined by Justice Kennedy—decided the case on the basis of the Court’s 1992 *Cipollone* ruling, where a plurality of four justices had held that the federal statute preempts common law requirements only if the state tort claim is predicated on a manufacturer’s legal duty “based on smoking and health,” as opposed to a “more general obligation,” such as a duty not to deceive (which covers all producers and sellers). This slicing and dicing of causes of action emasculates any federal preemption statute on which it is brought to bear. It invites plaintiffs’ lawyers to engage in pleading exercises until they find a cause of action that is sufficiently general to escape preemption.

In *Good*, they succeeded. The consumer class action at issue was not based on any claim of adverse health effects (which are obviously based on smoking and health and, besides, would destroy the commonality of the class), but rather on the contention that plaintiffs would have paid less for “light” cigarettes had they been told the full truth about their self-destructive behavior. The claimed damage is the difference between the actual price

and the hypothetical price, times packs purchased, times class members.

Wyeth v. Levine, the past term’s most important and depressing preemption case, is just such a case of “implied” preemption. FDA-approved labels, the majority said, are a mere federal floor, or minimum. Their adequacy will henceforth be determined not by FDA experts but by random juries.

There are thirty-plus *Good* copycat consumer class actions pending in state and federal courts. Pre-*Good*, those cases were on life support. Post-*Good*, they are in fine shape, and several moribund cases—including a \$10.1 billion verdict set aside by the Illinois Supreme Court—have sprung back to life. In a difficult economy, the justices have enacted a stimulus package for the trial bar.

Goodbye, Gibbons?

Good is an “express” preemption case. Liberal justices approach such cases with a “presumption against preemption.” Originalists have insisted that this made-up canon loads the dice against Congress and has no place in preemption law. That position, which united the *Good* dissenters, is entirely right. Alas, it has been made to rest on an interpretive literalism that, when applied to federal statutes that do not contain preemptive magic words, tends to produce very unfortunate consequences. *Wyeth v.*

Levine, the past term’s most important and depressing preemption case, is just such a case of “implied” preemption.

Wyeth arose over a tragic injury to a patient whose doctor and nurse, in an act of flagrant malpractice, had administered a drug in direct contravention of the federally approved warning label. The wording of that label conformed with—in fact, was practically dictated by—Food and Drug Administration (FDA) requirements. Even so, by a 6–3 majority, the Court decided against preemption. (Justice Alito dissented, joined by Chief Justice Roberts and Justice Scalia.) FDA-approved labels, the majority said, are a mere federal floor, or minimum. Their adequacy will henceforth be determined not by FDA experts but by random juries.

One would think that federal health and safety statutes, as well as agency regulations implementing them, preempt state law by implication when the federal standards establish not a minimum, but rather an optimum, standard. The central case for that proposition is, or was, *Geier v. Honda Motor Co.* (2000). Justice Breyer’s

opinion for the 5–4 *Geier* majority explained that excessively strict standards can increase risk just as unduly lax ones can (for example, by discouraging or slowing innovation). For that reason, jury-imposed liability standards go beyond the federally determined optimum conflict with federal law and should be deemed preempted.

In *Wyeth*, however, Justice Breyer effectively repudiated his *Geier* opinion.¹⁹ More disturbing yet, Justice Thomas, already among the dissenters in *Geier*, submitted a concurring opinion in *Wyeth* that berates the majority for being too solicitous of preemption.

Ominously, Justice Thomas’s opinion begins by characterizing the Supremacy Clause as “an extraordinary power in a federalist system”—as if that lynchpin of our federal system, which ensures that federal law trumps any and all conflicting state law, were somehow suspect. To protect federalism’s “delicate balance,” Justice Thomas insists, “pre-emptive effect [must] be given only to those federal standards and policies that are set forth in, or necessarily follow from, the statutory text. . . . Pre-emption must turn on whether state law conflicts with the text of the relevant federal statute or with federal regulations authorized by that text.”²⁰ It must not turn, as in Justice Thomas’s estimation it has in far too many cases, on creative judicial constructions of congressional “purposes” or on “tensions” with supposed but unlegislated federal “objectives.” The “Court’s entire body of ‘purposes and objectives’ pre-emption jurisprudence,” Justice Thomas declares, “is inherently flawed.”²¹

Of course, statutory interpretation must not produce, for preemptive or other purposes, statutes that Congress never enacted. By foreclosing any judicial consideration of purposes, however, Justice Thomas puts an enormous burden on the determination of what exactly constitutes a conflict between federal and state law. His *Wyeth* opinion is strikingly diffident on that point, and his inability to perceive an objective conflict in this case is alarming. If any federal policy “necessarily follows from” a statutory text, it is the FDCA’s attempt to strike an optimum balance among risks. Every medicine has side effects and can be misused. What is the point of the federal

drug-approval process if not to balance these risks against the benefits of a drug that would save lives? What is the point of labeling standards if not to guard against the twin dangers of under- and overwarning? And what remains of

the FDA’s mission now that any jury can hold any pharmaceutical company liable for any reason or, as far as federal law is concerned, for no reason at all?

Congress, the standard refrain rings, can easily clarify matters by clearly stating its intent to preempt. That reply, however, will not do. States have every incentive and myriad ways to circumvent federal law. Congress cannot possibly foresee those stratagems. It can preempt states only for as long as trial lawyers and state politicians (including judges) cannot think of a sufficiently clever way of “doing indirectly what they may not do directly.” What preemption law needs, therefore, is not niggling statutory parsing, let alone a clear statement canon. What it needs is a rule against circumvention—the statutory equivalent of the constitutional maxim recognized in *Polar Tankers*.

Mind you, that used to be the law.

Prior to the New Deal cases—the cases Justice Thomas views as too preemption-friendly—no one thought that Congress had to express its intent to preempt: preemption was deemed automatic and incident to the enactment of federal, supreme law. It is hard to tell how many of the old cases Justice Thomas would care to overrule along with the modern purposes jurisprudence. Clearly among them, however, is the Supreme Court’s famous first engagement with preemption and the Commerce Clause, *Gibbons v. Ogden* (1824).

The question in *Gibbons* was whether a state-granted steamship monopoly interfered with a competitor’s coastal trading license, issued and obtained under a federal statute. Did that statute—which contained no express preemption provision—operate in conflict with or parallel to whatever licensing requirements states might impose with respect to their own ports? The federal trading license is a precise analog to a federal drug label; what, then, of their judicial treatment? A federal drug label, Justice Thomas says, creates no “unfettered right, for all time, to market [a] drug with the specific

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label that was federally approved.”²² Chief Justice Marshall, too, considered the argument that a federal trading license “gives no right to trade; and that its sole purpose is to confer the American character” on ships and their owners.²³ Marshall, however, rejected that argument. *Gibbons* speaks the language of conflicts, but it is clearly a case of what we now call implied preemption. By the lights of the *Wyeth* concurrence, *Gibbons* was either wrong or should have been decided under the dormant Commerce Clause—if, *pace* Justice Thomas, it exists.

No More *M’Culloch*?

Since the enactment of the National Bank Act (NBA) in 1864, the banking operations of federally chartered institutions have been shielded against investigation and prosecution by the states. (Conversely, state banks are subject almost exclusively to state supervision and regulation.) *Cuomo v. Clearing House Association* effectively ends that sensible system. In an opinion by Justice Scalia and joined by the Court’s liberal bloc, the Court held that the NBA’s express prohibition against the exercise of state visitorial powers—roughly, ongoing oversight over corporate affairs—over national banks does not preempt state authority to sue such banks for alleged violations of state laws of general applicability, such as discriminatory lending laws. The Office of the Comptroller of the Currency (OCC), which administers the NBA, had interpreted the relevant statutory provision to preempt state lawsuits targeted at the banks’ federally authorized operations (such as lending) but not general matters of zoning or contract law. Justice Scalia rejected that interpretation as so unreasonable as to merit zero judicial deference. Come again?

If the facile description of a state lending law as a law of “general applicability” does not defy belief, the distinction between law enforcement and visitation surely does. State attorney general lawsuits, Justice Scalia avers, will leave the OCC’s administrative (visitorial) oversight “unaffected.” Nor is there reason to fear that litigation might get out of hand: after all, a state litigant “must endure the rules of procedure and discovery, and risk sanctions if his claim is frivolous or his discovery tactics abusive.”²⁴

New York attorney general Andrew Cuomo, the petitioner in *Clearing House*, has read the decision right: the regulation of national banks will henceforth be a “cooperative” federal-state enterprise. Pre-*Clearing House*, the understanding was just the opposite: financial institutions should be regulated by the feds or by states, but not by both.

Would this be the same procedure and discovery the Roberts Court has criticized, time and again, as prone to abuse and extortion, and that it has sought in its better moments to rein in?²⁵ And when a state attorney general puts a bank on notice that he is prepared to “endure” those rules and rigors, what is the likely corporate

response—let him endure, or accede to his demand to camp out at corporate headquarters for a look at the books? The power to sue is the power to visit. To hold otherwise is willful blindness.

New York attorney general Andrew Cuomo, the petitioner in *Clearing House*, has read the decision right: the regulation of national banks, he commented on the ruling, will henceforth be a “cooperative” federal-state enterprise. Pre-*Clearing House*, the understanding was just the opposite: financial institutions should be regulated by the feds or by states, but not by both. That dual, nineteenth-century understanding is, or was, unambiguously reflected in the NBA. Its earlier and more famous articulation was John Marshall’s decision in *M’Culloch v. Maryland* (1819), holding that states may not tax or otherwise burden the Bank of the United States.²⁶ That prohibition against the states—a judicially crafted rule of federal common law, not a constitutional disability—may

now be in doubt.

Perhaps (you might think, although Justice Scalia probably no longer does), federal common law would still protect a Bank of the United States, as opposed to private banks chartered by the United States. Think again: when *M’Culloch* was decided, the United States held 20 percent of the shares of the Bank of the United States. It now holds 34 percent of Citigroup. When Mr. Cuomo or the taxman cometh to visit, whose rules will govern—John Marshall’s or Antonin Scalia’s?

What Gives?

Is there a pattern to originalist lapses into an anti-integrationist jurisprudence? The chief justice seems almost immune to the temptation; Justice Alito, entirely so. Justice Thomas and Justice Scalia, as just seen, suc-

cumb to it in different cases and for differing reasons. One can say this much, though: originalists will get the cases right so long as there is a clause to interpret—a Tonnage Clause, an express preemption provision. Not so in cases that turn on questions of constitutional or statutory purpose and structure, or on the common law forms of argument that drive *Gibbons and M’Culloch*: on those occasions, originalists drift into the Manichean view that where the clauses end, jurisprudence ends—and raw politics and judicial imperialism begin. The dormant Commerce Clause is not misnamed or misapplied but “illegitimate.” Implied preemption is “fundamentally flawed.” The Court must have absolutely none of it. To the extent that originalism lapses into this mindset, it compromises the federal judiciary’s constitutional obligation to produce political and economic integration by means of law—in other words, to make the Constitution work.

Integrate the nation and make the Constitution work as best as it will: that program encapsulates the Marshall Court. No pair of decisions encapsulates it better than *Gibbons and M’Culloch*. Suggestions to the effect that the great chief’s jurisprudence is something to be excused, or at any rate not to be followed, have been a staple of originalist dormant Commerce Clause opinions for some years; now, in *Wyeth* and *Clearing House*, the sniping has spread to preemption cases.

The time may have come to have the debate out in the open. If the Marshall Court’s jurisprudence is suspect, originalists should not sidle up to the proposition, they ought to say so. And it will not do to dismiss John Marshall’s jurisprudence as an admirable but, alas, extrajudicial display of statesmanship that today’s Court need not and should not emulate. However tempting, the suggestion is wrong on all counts.

John Marshall Roberts?

Unlike the Marshall Court, the Roberts Court need not apprehend the country’s territorial disintegration. It must,

however, deal with the deeper, perennial problem of faction-driven institutional disintegration.

Up to a point, institutional fragmentation is a constitutional design feature. Its proper, constitutional operation, however, rests on definable conditions. First, institutional actors are supposed to specialize consistent with their comparative advantages, as when the executive supplies energy in government, Congress regulates commerce among the states, and local governments police the neighborhoods. Second, institutions are supposed to operate as mutual checks and veto points. The Constitution institutionalizes competition or, in more traditional parlance, makes “ambition counteract ambition.” Third, the system requires a Supreme Court with the will to hold political institutions to the constitutional bargain and, in that fashion, to contain the violence of faction.

These conditions have ceased to exist. Specialization? *Global* warming requirements have been set by the failed state of California; the national government has acceded and, moreover, promised that its Government Motors division will produce conforming vehicles. Institutional competition? Typically, the players collude, as when state attorneys general collect evidence for the plaintiff bar’s class actions; states embrace Alaska’s revenue grab in *Polar Tankers*; Congress labors, not to restore the authority the

FDA lost in *Wyeth* but to empower the trial lawyers and juries who are still preempted under *Riegel* and the MDA; and an administration supposedly committed to financial regulatory reform proposes to codify the *Clearing House* decision.²⁷

The system cannot correct itself. To be sure, an administration with very big plans for the nation’s economy may yet conclude that institutional disintegration may thwart progressive ambitions, as well as private orderings and designs. Perhaps, private companies that have wangled subsidies for “green jobs” and wind turbines should be enabled to do business in the coastal waters that environmentalists would close to the U.S. Navy’s wartime exercises.²⁸ Perhaps, bankruptcy courts should be allowed to do

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what neither CEOs nor Congress can do, which is to rid firms of accumulated interest group dross. And perhaps, institutions that are “too big to fail” should be deemed too big to be litigated into the ground. As the administration’s song tsar has put it, though, “None of this has happened yet.”²⁹ And none of it is going to happen. Progressives do not actually believe in the possibility of coherent public policy, only in constituency politics. That faith calls for more centrally designed disintegration, not less. All of the administration’s initiatives reflect that agenda.

Against this backdrop, it has become ever more urgent to remind the Court of its lasting constitutional responsibility—a responsibility that many of its members have renounced or ceased to recognize. The pro-regulatory proliferation camp, joined this term by Justice Breyer, will soon be joined by Justice Sotomayor.³⁰ The litigation boutiques that pitch the proplaintiff, prostate agenda to the Supreme Court (such as Kellogg Huber, the undisputed leader of the pack) build on that bloc of four and concentrate on picking off one more vote—Justice Kennedy’s, or Scalia’s, or Thomas’s. Defense lawyers must hold all those votes, even as the justices dig in their heels ever more deeply on diverging theories.

It has fallen to the chief justice and to Justice Alito—his “Brother Story,” as the chief justice of an earlier age affectionately called his most distinguished ally—to stem defections and to restore coherence and good sense to the doctrines that govern the commerce of the United States. Almost certainly, that is not what the Chief envisioned in expressing, in the course of his confirmation hearings, his sincere desire for a more harmonious, less ideological Court. But it is now his most important task.

AEI research assistant Luci Hague and editorial assistant Victoria Andrew worked with Mr. Greve to edit and produce this Constitutional Outlook.

Notes

1. The tort cases are *Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252 (2009); *CSX Transp., Inc. v. Hensley*, 129 S. Ct. 2139 (2009); *Wyeth v. Levine*, 129 S. Ct. 1187 (2009); *Altria v. Good*, 129 S. Ct. 538 (2008); *Philip Morris USA Inc. v. Williams*, 129 S. Ct. 1436 (2009); and *Atlantic Sounding Co. v. Townsend*, 557 U.S. ____ (2009), 2009 WL 1789469. Cases on arbitration are *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009); *Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009); and *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009). On preemption, see *Altria v. Good*,

129 S. Ct. 538 (2008); *Wyeth v. Levine*, 129 S. Ct. 1187 (2009); and *Cuomo v. Clearing House Association*, 557 U.S. ____ (2009), 2009 WL 1835148. The four environmental citizen suit cases are *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009); *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009); *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365 (2008); and *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. ____ (2009), 2009 WL 1738643. A fifth environmental case, *Burlington N. & S. F. R. Co. v. United States*, 129 S. Ct. 1870 (2009), addresses limited liability exposure under the federal “Superfund” law.

2. *Pacific Bell v. linkLine*, 129 S. Ct. 1109 (2009). The Court’s sustained effort at the antitrust front continued this past term.

3. See, for example, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); and, this past term, *Ashcroft v. Iqbal*, 128 S. Ct. 2931 (2009).

4. *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002).

5. For instructive illustrations, see the Court’s gentle treatment of environmental standing to sue in this term’s decisions in *Winter v. Natural Resources Council*, 129 S. Ct. 365 (2008); and *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009).

6. *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277, 2282 (2009).

7. *Ibid.* (quoting Justice Joseph Story). Left unchecked, state governments will not only do very bad things to each other’s citizens, they will, in fact, agree to do so, as each government prefers to tax citizens and firms in other states. Sixteen states, as well as the Multistate Tax Commission, supported Alaska’s position in *Polar Tankers*.

8. *Ibid.*, 2282, citing *The Passenger Cases*, 7 How. 283, 458 (1849).

9. The *Polar Tankers* majority split over the question of whether docked ships could be subjected to a properly configured property tax—that is, a law that taxes both in-state and out-of-state vessels alongside other property on a nondiscriminatory basis. Justice Breyer, writing for a plurality of four justices, suggested that such a tax might pass constitutional muster. Chief Justice Roberts and Justice Thomas, in contrast, insisted that the Tonnage Clause prohibits any duty, including a nondiscriminatory imposition; Justice Alito would have passed on the question. While the antidiscrimination reading is probably preferable, the question is close. But one can live with the interpretive difficulty: it arises only after the Tonnage Clause has done most of its work.

10. *Kansas City Southern R. Co. v. Kaw Valley Dist.*, 233 U.S. 75, 79 (1914).

11. *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935).

12. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).

13. The Commerce Clause is addressed to Congress, not the Court, and the injunction against extraterritoriality presumably

predates the enactment of a Due Process Clause that applies to the states.

14. Justice Scalia and Justice Thomas have stated their positions on the dormant Commerce Clause many times. The canonical sources are, respectively, *Tyler Pipe v. Wash. Dept. of Rev.*, 483 U.S. 232, 254 (1987) (Scalia concurring in part and dissenting in part); and *Camps Newfoundland/Owatonna v. Town of Hamilton*, 520 U.S. 564, 609 (1996) (Thomas dissenting). For Chief Justice Roberts's position, see *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 345 (2007).

15. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

16. See *Philip Morris USA v. Williams*, 549 U.S. 346 (2007) (holding that state juries may not punish corporations "on the basis of" extraterritorial conduct); *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2008) (scrutinizing and rejecting jury instructions); and *Philip Morris USA v. Williams*, 129 S. Ct. 1436 (2009) (dismissing certiorari as improvidently granted).

17. *Caperton v. A. T. Massey Coal Corp.*, 129 S. Ct. 2252, 2255 (2009).

18. *Altria v. Good*, 129 S. Ct. 538, 540 (2008).

19. Justice Breyer's concurrence is an unpersuasive attempt to cover his tracks. It suggests that regulatory agencies might still be able to lend preemptive force to their regulations by adopting that position through full-blown notice-and-comment rulemaking, as opposed to the less formal process followed by the Food and Drug Administration. *Wyeth v. Levine*, 129 S. Ct. 1187, 1204 (2009) (Breyer concurring). Any hope that this position might create a safe harbor was dashed in the very next preemption case, *Cuomo v. Clearing House*, in which the majority, including Justice Breyer,

gave zero deference to just the sort of notice and comment preemption suggested by the *Wyeth* concurrence.

20. *Wyeth v. Levine*, 129 S. Ct. 1187, 1209 (2009).

21. *Ibid.*, 1211.

22. *Wyeth v. Levine*, 129 S. Ct. 1187, 1210 (2009).

23. *Gibbons v. Ogden*, 22 U.S. 1, 214 (1824).

24. *Cuomo v. Clearing House Association*, 557 U.S. ____ (2009), 2009 WL 1835148, slip op. 8–9.

25. See, for example, *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 559 (2007), which discusses imposing higher pleading standards in light of high discovery costs and "the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side."

26. *M'Culloch v. Maryland*, 17 U.S. 316, 436 (1819). "[T]he States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government."

27. See "Consumer Financial Protection Agency Act of 2009," U.S. Department of the Treasury, available online at www.financialstability.gov/docs/CFPA-Act.pdf (accessed July 9, 2009).

28. See this term's decision in *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008).

29. Bruce Springsteen, "Livin' in the Future," *Magic* (New York: Columbia Records, 2007).

30. For Judge Sotomayor's extravagantly antipreemption stance, see her opinion and decision in *Dabit v. Merrill Lynch*, 395 F.3d 25 (2005), which even this Supreme Court reversed by an 8–0 vote in *Merrill Lynch v. Dabit*, 547 U.S. 71 (2006).